

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

| | | |
|--------------------------------|---|------------------|
| JUDICIAL WATCH, INC., |) | |
| 425 Third Street SW, Suite 800 |) | |
| Washington, DC 20024, |) | |
| |) | |
| Plaintiff, |) | |
| |) | Civil Action No. |
| v. |) | |
| |) | |
| UNITED STATES DEPARTMENT |) | |
| OF COMMERCE, |) | |
| 1401 Constitution Avenue, NW |) | |
| Washington, DC 20230, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

COMPLAINT

Plaintiff Judicial Watch, Inc. (“Plaintiff”) brings this action against Defendant U.S. Department of Commerce (“Defendant”) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As grounds therefor, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff Judicial Watch, Inc. is a not-for-profit, educational organization incorporated under the laws of the District of Columbia and headquartered at 425 Third Street SW, Suite 800, Washington, DC 20024. Plaintiff seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. As part of its mission, Plaintiff regularly requests records from federal agencies pursuant to FOIA. Plaintiff analyzes the

responses and disseminates its findings and the requested records to the American public to inform them about “what their government is up to.”

4. Defendant U.S. Department of Commerce is an agency of the United States Government. Defendant has possession, custody, and control of records to which Plaintiff seeks access. Defendant is headquartered at 1401 Constitution Avenue, NW, Washington, DC 20230.

STATEMENT OF FACTS

5. On September 12, 2019, Plaintiff submitted a FOIA request to the U.S. Census Bureau (“Census Bureau”), a component of Defendant, seeking the following:

- (1) Any and all records concerning, regarding, or relating to the U.S. Census Bureau’s use, through temporary hiring, of non-U.S. citizens as translator or in any other role to obtain an accurate count of immigrant community populations; and**
- (2) Any and all records concerning, regarding, or relating to measures taken by the U.S. Census Bureau to ensure that non-U.S. citizens hired for the above-mentioned purpose are permanent legal residents of the United States.**

The request was sent through foiaonline.gov.

6. By email dated September 12, 2019, the Census Bureau acknowledged receipt of the request and advised Plaintiff that the request had been assigned Tracking Number DOC-CEN-2019-002201.

7. By email dated September 18, 2019, the Census Bureau requested clarification of the request, asserting, “We need to know names of individuals and/or program areas you would liked (sic) searched as this scope is too broad to be a formal FOIA Request.”

8. Plaintiff responded by email dated October 11, 2019, identifying two Census Bureau programs – the Decennial Census of Population and Housing and the American

Community Survey – to be searched for records responsive to the request. Plaintiff also provided the Census Bureau with an article entitled “Census Bureau Seeks to Hire Non-U.S. Citizens Ahead of 2020,” published on August 6, 2019 by *U.S. News & World Reports*, that had prompted the request. Plaintiff also noted that the Census Bureau’s Public Information Office commented in the article about the subject matter of the request, as did the Census Bureau’s Associate Director of Field Operations Timothy P. Olson. A copy of the *U.S. News & World Reports* article is attached as Exhibit 1 and incorporated by reference.

9. By email dated October 16, 2019, the Census Bureau again requested clarification, ignoring the clarification Plaintiff had provided on October 11, 2019 and making the same assertion it had made in its September 18, 2019 email: “We need to know names of individuals and/or program areas you would liked (sic) searched as this scope is too broad to be a formal FOIA Request.”

10. By email dated October 17, 2019, Plaintiff responded:

The Census Bureau has more than enough information to search for responsive records. The request plainly seeks records about the temporary hiring of non-citizens to help conduct the 2020 decennial census and ongoing American Community Survey and efforts to ensure such hires are permanent resident aliens. We even forwarded you the August 6, 2019 U.S. News & World Report article about the Census Bureau’s non-citizen hiring plans, another copy of which is attached for your convenience.

11. In emails dated October 18, 2019 and October 23, 2019, the Census Bureau erroneously claimed Plaintiff had not sent it the information it requested, ignoring Plaintiff’s October 11, 2019 and October 17, 2019 communications.

12. In a further email dated November 1, 2019, the Census Bureau again erroneously claimed Plaintiff had not sent it the information it requested, again ignoring Plaintiff’s October

11, 2019 and October 17, 2019 communications. In its November 1, 2019 email, the Census Bureau requested a telephone conference to discuss the request.

13. Plaintiff responded that same day, November 1, 2019, agreeing to the conference call, but reiterating that it had repeatedly described the records it seeks and that the Census Bureau had not demonstrated or explained what additional information it allegedly required.

Plaintiff also wrote:

We've advised you repeatedly that we seek records about the temporary hiring of non-citizens to help conduct the 2020 decennial census and ongoing American Community Survey, and efforts to ensure such hires are permanent resident aliens. We twice forwarded you the U.S. News & World Report article that prompted the request, which extensively quoted Census Bureau Associate Director for Field Operations Tim Olson. Associate Director Olson was asked about the issue just recently at the October 22, 2019 "2020 Census National Day of Recruitment" conference in Phoenix, Arizona. His comments about non-citizen hiring begin at approximately 23:40 of the following video, which is posted on the Census Bureau's YouTube page: <https://www.youtube.com/watch?v=vzFLC5QPBqg&feature=youtuabe&t=1420>. An October 25, 2019 NPR report about his comments is attached.

14. Plaintiff spoke with Census Bureau representatives by telephone on November 6, 2019. Following the conference call, the Census Bureau sent Plaintiff a broadly drawn Census Bureau organizational chart and demanded, "Per our previous conversation, you will provide: (1) Date range (2) Types of Records (3) Any Key Words (4) Name and/or program office employees." The Census Bureau did not state why it waited nearly two months to demand this information, which was readily discernable from Plaintiff's earlier communications in any event.

15. On November 8, 2019, Plaintiff responded to the Census Bureau, by email, again disputing the Census Bureau's alleged inability to search for records responsive to the request. Plaintiff asserted:

As the news articles and video we sent you plainly demonstrate, as of August 2019 the Census Bureau was considering hiring and sometime in October 2019 it decided to hire non-citizens to work on the 2020 decennial census despite a legal

requirement that federal employees be citizens. The U.S. News & World Report article quotes Census Bureau associate director for field operations Tim Olson as stating, with regard to the hiring of non-citizens for the 2020 census, “There are some flexibilities within the Appropriations Act that would permit, for example, based on language requirements, some exemptions . . . We are actively working though those flexibilities to see if they can be used in 2020. We are not there yet.” Director Olson’s comments on the Phoenix “2020 Census Day of National Recruitment” video demonstrates that the Census Bureau has since decided to hire non-citizens to work on the 2020 census. It’s now “there.”

16. As Census Bureau demanded, Plaintiff provided suggested date ranges, types of records, key words, and names and/or program office employees. Again, none of the information Plaintiff provided was not readily discernable from Plaintiff’s earlier communications.

17. Plaintiff also confirmed in its November 8, 2019 email that the “request plainly seeks records about the Census Bureau’s consideration of whether to hire noncitizens – as a category of persons, not any individual hiring decisions – for work on the 2020 Census.”

18. Regarding the organizational chart, Plaintiff suggested that the Census Bureau search the records of the Associate Director for Field Operations, the Director, the Deputy Director/Chief Operating Officer, the Chief of Staff, the Chief Administrative Officer, the Associate Director for Decennial Census Programs, the Decennial Census Management Office, and the American Community Survey Office. Unlike the Census Bureau, Plaintiff has no expertise in the Census Bureau’s organizational structure. Plaintiff’s suggestions were little more than guesswork based on the names of the various components listed on the organization chart and the information Plaintiff had already identified and provided to the Census Bureau. The Census Bureau is in a far better position than Plaintiff to know where to search for records responsive to the request and could and should have done so based on the reasonable

descriptions and information Plaintiff provided by October 17, 2019, if not in the September 12, 2019 request itself.

19. Finally, Plaintiff also reiterated in its November 8, 2019 email that, unless the Census Bureau advised Plaintiff it would undertake a search and provide a date certain when responsive records will be produced, Plaintiff intended to file suit on or after November 12, 2019. Plaintiff stated that it hoped litigation would not be necessary.

20. As of the date of this Complaint, the Census Bureau has not indicated that it will process Plaintiff's request or even responded to Plaintiff's most recent communication. It also has not: (i) produced the requested records or demonstrated that the requested records are lawfully exempt from production; (ii) notified Plaintiff of the scope of any responsive records they intend to produce or withhold and the reasons for any withholdings; or (iii) informed Plaintiff that it may appeal any adequately specific, adverse determination.

COUNT I
(Violation of FOIA, 5 U.S.C. § 552)

21. Plaintiff realleges paragraphs 1 through 20 as if fully stated herein.

22. Defendant is in violation of FOIA.

23. Plaintiff is being irreparably harmed by Defendant's violation of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

24. To trigger FOIA's administrative exhaustion requirement, Defendant was required to make a final determination on Plaintiff's request within the time limits set by FOIA. Plaintiff disputes that the request required clarification or that response time for Defendant to make a final determination was tolled. Assuming the response period was tolled until October 17, 2019, however, Defendant's determination was due by November 12, 2019 at the latest.

25. Because Defendant failed to make a final determination within the time limits set by FOIA, Plaintiff is deemed to have exhausted its administrative appeal remedies.

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to the request; (2) order Defendant to produce, by a date certain, any and all non-exempt records responsive to Plaintiff's request and a *Vaughn* index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to the request; (4) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated: November 14, 2019

Respectfully submitted,

/s/ Paul J. Orfanedes

Paul J. Orfanedes

D.C. Bar No. 429716

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Counsel for Plaintiff

EXHIBIT 1

Census Bureau Seeks to Hire Non-U.S. Citizens Ahead of 2020 - Correction Appended

USNEWS.com

August 6, 2019 Tuesday

Correction Appended

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Section: CIVIC; National News; Vol.; No.

Length: 1061 words

Byline: Lauren Camera

Highlight: Special exemptions to federal hiring laws allow the agency to temporarily employ noncitizens as officials attempt to obtain an accurate count of people living in immigrant communities.

Body

The Census Bureau is pursuing a legal loophole that its officials believe would allow them to temporarily hire non-U.S. citizens as part of its efforts to reach populations that are difficult to count, including in non-English speaking and immigrant communities.

People employed by the Census Bureau, including those hired temporarily, are considered federal employees and are legally required to be U.S. citizens. Specifically, the annual Appropriations Act prohibits the use of appropriated funds to employ noncitizens within the U.S.

Some exceptions exist, however, that allow the agency to hire translators temporarily, as well as to hire people admitted to the U.S. for permanent residence who are seeking citizenship, to hire people admitted as refugees or granted asylum, and to hire people for up to 60 days on an emergency basis.

Temporarily employed translators fall under a so-called "excepted service provision," which gives each agency wide latitude to set its own standards for hiring based on what specific job it's trying to fill.

"There are flexibilities within the Appropriation Act that would permit, for example, based on language requirements, some exemptions," says Tim Olson, associate director for field operations at the Census Bureau. "We are actively working through those flexibilities to see if they can be used in 2020. We are not there yet."

Asked whether the bureau planned to employ people living in the country illegally, a spokesman said, "There is nowhere in our legal flexibilities that refers to people we could possibly hire as 'illegal.'" When pressed as to whether it's an option under the current law, the spokesman repeatedly demurred, saying that the term "noncitizen" encompasses "anyone who is not a U.S. citizen."

Census officials subsequently denied that they have any plans to hire anyone who is in the country illegally.

"The Census Bureau only intends to temporarily hire permanent legal residents to act as translators," said Michael Cook, a division chief in the agency's public information office.

Given the heightened immigration enforcement landscape driven by President Donald Trump, who, among other things, has prioritized ICE raids, deportations and building a wall along the southern border, hiring noncitizens could lessen an undercount in communities that have been most affected by the administration's policies and where

Census Bureau Seeks to Hire Non-U.S. Citizens Ahead of 2020 - Correction Appended

residents might be less reluctant to fill out a government form. It also remains to be seen how Trump's base would respond to the federal government potentially hiring noncitizens.

The move comes as many census experts have warned of a severe undercount among hard-to-reach populations -- the result of a heightened immigration enforcement landscape and the administration of the census online for the first time.

"Our country is increasingly diverse, language wise, culture, race, ethnicity," says Olson, who has worked on the last four decennial censuses. "This country is getting more and more diverse all the time. When we look at hard to count populations -- the groups of people less likely to participate in the census -- that is our target in terms of outreach."

During the last decennial census, in 2010, the allowance in the law was more clearly spelled out and the bureau did have authority to hire noncitizens, though in very small numbers. Ultimately, he says, a fraction of the 500,000 people temporarily hired were not U.S. citizens.

"We always push [to target] the hard-to-count communities [with] intentional outreach because that's the hardest area to get an accurate count," Olson says. "That's where our focus is."

Ahead of its major hiring frenzy this month and into the fall, the bureau has received 546,000 applications. Out of that pool, 1 out of 5 applicants are bilingual. Of those who are bilingual, half speak Spanish and the other half speak one of more than 300 languages and dialects.

[SEE: The Week in Cartoons for Aug. 5-9]

"That's an amazing attribute of our current applicant pool," Olson says. "As we continue going forward we will intentionally get the word out within hard-to-count communities."

Leading up to the 2010 census, the bureau recruited 3.9 million job applicants, ultimately hiring about 500,000 people.

But today's employment environment is much different, with fewer people looking for work: In the lead up to the 2010 census, the unemployment rate fluctuated between 9% and 10%. Compare that to today's unemployment rate, which was 3.4% as of June, according to the Bureau of Labor Statistics.

By mid-February, the bureau is aiming for an applicant pool of 2.3 million. The 549,000 it currently has is more than double its projected goal of 205,000 at this point -- a success Olson pins in part on a competitive wage rate of \$13.50-\$30 per hour.

"We are on a path to an applicant pool that will be reflective of the neighborhood we will be hiring from, and many of those neighborhoods are going to require language skills other than English," he says.

This year, however, census officials have an even heavier lift than in 2010. Not only will the census be administered online for the first time ever -- creating potential problems in areas of the country with limited access to the internet - - but also the immigration landscape is vastly more politicized, and it's widely anticipated that the threat of the citizenship question alone will drive down participation rates in communities that serve many Hispanic and immigrant families.

The last time the census was administered in 2010, 1 million children 4 years old and younger were missed -- the most undercounted age group by nearly double -- and it cost states roughly \$500 million in federal funds. The next most undercounted age group was 5- to 9-year olds.

So far, Olson says he isn't phased.

"I'm really pleased with where we are at," he says. "I'm confident that we will be successful."

Census Bureau Seeks to Hire Non-U.S. Citizens Ahead of 2020 - Correction Appended

Lauren Camera is an education reporter at U.S. News & World Report. She's covered education policy and politics for nearly a decade and has written for Education Week, The Hechinger Report, Congressional Quarterly, Roll Call, and the Chronicle of Higher Education. She was a 2013 Spencer Education Fellow at Columbia University's School of Journalism, where she conducted a reporting project about the impact of the Obama administration's competitive education grant, Race to the Top.

Correction

Update 08/07/19: This story has been updated with additional comment from the U.S. Census Bureau

Graphic

Picture, A Census worker hands out fliers in Bay Ridge, New York, in 2010. A legal loophole may allow the Census Bureau to hire non-U.S. citizens as part of its efforts to reach immigrant communities., Robert Nickelsberg/Getty Images

Load-Date: August 8, 2019

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